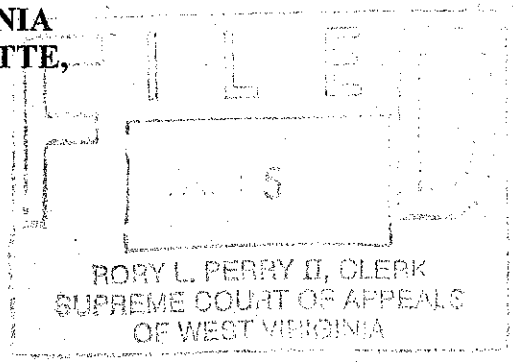
NO. 090405

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Action No: 07-MISC-139 (Circuit Court of Kanawha County, West Virginia)

STATE OF WEST VIRGINIA
ex rel. GREGORY BURDETTE,

Petitioner,

v.



THE HONORABLE PAUL ZAKAIB, JR.
Kanawha County Circuit Court Judge,

Respondent.

RESPONSE TO PETITION FOR WRIT OF MANDAMUS AND IN OPPOSITION TO ISSUANCE OF RULE TO SHOW CAUSE

COMES NOW, the State of West Virginia, by Jennifer D. Meadows, Assistant Prosecuting Attorney, affected parties in the above-referenced court action, who oppose the instant Petition for Writ of Mandamus and deny that the Petitioner is entitled to such relief. Wherefore, the State of West Virginia submits the following arguments and authorities in opposition to the Petition and the issuance of a Rule to Show Cause.

INTRODUCTION

On April 11, 1986, Petitioner was convicted by a petit jury of six counts of forgery, six counts of uttering, one count of kidnapping without a recommendation of mercy and one count of first-degree murder with a recommendation of mercy. The first-degree murder count was for

felony-murder based upon the underlying crime of robbery. Petitioner's direct appeal to this Court was refused on November 7, 1989. Petitioner then instituted a habeas corpus action which was denied and again review was refused by this Court on January 19, 2005. Petitioner then filed the Motion for Post-Conviction DNA Testing pursuant to West Virginia Code Section 15-2B-14.[1]

Petitioner was afforded a hearing on this Motion on October 27, 2008 to give the Petitioner ample opportunity to present his position. Based upon the briefs submitted by the parties and arguments of counsel, the Court issued the Order denying the Motion on March 2, 2009. (*See* Appendix A to *Petition for Writ of Mandamus*). Petitioner now seeks immediate issuance of a Writ of Mandamus to essentially overturn that ruling. Because the Petitioner fails to fulfill the necessary requirements of West Virginia Code Section 15-2B-14, this Court should not issue a rule to show cause and should DENY the Petitioner's Writ of Mandamus.

BACKGROUND FACTS

The victim in this case was Vincent Tyree. Mr. Tyree was a teacher and coach at Sissonville Junior High School. On November 17, 1983, he left school around 3:00 p.m. and disappeared. On November 18, 1983, a hunter found Mr. Tyree's body on a hill near a gas pipeline at Second Creek in the Sissonville area of Kanawha County. He had been shot twice in the head and his body had been dragged down over the hill. Mr. Tyree had been shot once in the back of the head while walking up the hill and then shot again while lying face down on the

[1] West Virginia Code Section 15-2B-14 provides for a right to DNA testing *if* certain requirements are met. These requirements are discussed at length in the Argument of this Response.

ground. There was a spot of blood located on the ground that may have been where the victim was shot or where his body rested before being pulled down over the hill.

When police officers responded to the scene, they recovered one .38 caliber bullet from the ground. A second .38 caliber bullet was later retrieved from Mr. Tyree's head. His checkbook was stuffed into the pocket of his jacket. On Mr. Tyree's checkbook was a bloody fingerprint. His wallet and car keys were missing and were never recovered. Mr. Tyree's shoes had been removed from the body and were found by the hunter. Interestingly, the victim's socks were clean—meaning that his shoes were removed post mortem. No fingerprints were found on the shoes.

The police recovered a cigarette lighter with drywall compound on it near Mr. Tyree's body. They also recovered a cigarette butt with teeth marks on the filter. Mr. Tyree's vehicle was later discovered a few miles from where the body was found—near Humphrey's Church in Sissonville. It had been wiped clean of any prints. At the time he disappeared, Mr. Tyree was in the process of building a three-unit apartment building in Sissonville. He paid for materials and labor by check and often kept his checkbook in the glove compartment of his vehicle. Importantly, Petitioner was performing drywall work for Mr. Tyree at that apartment building. (Tr. 4207-4208).

Police investigators initially spoke with Petitioner to see if Mr. Tyree had came by the construction site on the date of his disappearance. However, during the course of the investigation, it was determined that Mr. Tyree's checks had been stolen and cashed by Petitioner. A handwriting expert, a fingerprint expert and two clerks from the Big H Store connected Petitioner to the forged checks.

The bloody fingerprint that was found on Mr. Tyree's checkbook was analyzed by FBI Latent Print Specialist Robert Moran. Mr. Moran testified at trial that the bloody fingerprint on the checkbook came from Petitioner's left middle finger. (Tr. at 2934-2935, 2941-2942). The blood on the checkbook was consistent with Mr. Tyree's blood. (Tr. 2774). Furthermore, West Virginia State Police Serologist Lynn Inman tested several items collected during the investigation—including the cigarette butt found at the scene. At trial, Ms. Inman testified as follows:

Q. And on State's Exhibit No., cigarette butts from the scene, I believe you tested for saliva, is that correct?

A. Yes, ma'am, I did.

Q. Okay, and what, if any results did you find here?

A. Saliva identified on the cigarette butts from the scene contained the genetic marker ABO Type O.

Q. Okay. Were you able to get any further genetic markers than that?

A. No, ma'am, saliva is the only genetic marker we test for is the ABO. . . .

Q. When you are testing saliva, the only thing that you test for is ABO blood types?

A. Yes, ma'am.

(Tr. 2777-2778). Inman also testified at trial she tested known cigarette butts from Petitioner that were retrieved from his car and house and determined from the saliva found on them that he was ABO Type O. (Tr. at 2782-2783).

In an effective cross-examination by Petitioner's attorney, Inman acknowledged that the cigarette butt in question may not belong to Petitioner:

Q. Oh, goodness, does that mean that the cigarette that was found at the scene is my client's cigarette?

A. No, sir I can only say that the blood types are consistent.

Q. Well, how many—what percentage of the population has O type blood?

A. Forty-three percent would be Type O, but eighty percent are secretors, so thirty-four percent would secrete a Type O, on that cigarette butt.

Q. Thirty-four percent, one –third of the people in this country have Type O blood then?

A. Thirty-four percent are Type O secretors.

Q. O secretors?

A. Yes, sir.

Q. And what percent are Type O, forty-three percent?

A. Yes, sir.

Q. So almost half the people in this country have Type O blood?

A. Yes, sir.

Q. Now is the only genetic marker that your laboratory is capable of doing on a saliva examination is that just to determine whether a person's blood is type A, B, AB, ABO, or O?

A. Yes, sir.

Q. That's all you can do?

A. Yes, sir.

Q. You can't check saliva any further than that?

A. No, sir.

Q. [O]h, by the way, did you ever check Greg Burdette's blood?

A. No, sir.

Q. You don't know what his type is; do you?

A. From the known cigarette butts, yes, sir, he is an O.

Q. But you never checked his blood?

A. No sir.

(Tr. at 2784-2786).

At trial, Petitioner admitted that he forged and uttered at least six checks that had been stolen from Mr. Tyree's checkbook. He cashed them at the Big H store using the alias "Dale Burdette." He also placed his sister's telephone number on the check. Using Mr. Tyree's checks, Petitioner obtained approximately $2,300.00. (Tr. 4210-4211). Petitioner further admitted that he used money from the forged checks to purchase a handgun and ammunition on November 10, 1983—just one week before the murder. The gun that the Petitioner purchased

was a .38 special revolver. To purchase the handgun, Petitioner used a fraudulent driver's license with his own photograph but with his brother's identifying information. (Tr. 4215-4220).

The bullets that were recovered from the scene of Mr. Tyree's murder were the same caliber as the bullets Petitioner purchased on November 10, 1983. Unfortunately, the murder weapon was never recovered. Petitioner claimed that the gun had been thrown into a river. However, his statements varied on that point. Sometimes, he claimed that the gun had been thrown into the Kanawha River near Patrick Street. (Tr. 4222). In other statements, he claimed that it was thrown into the river from a bridge on Poca River Road. (Tr. 4316). Additionally, a cigarette lighter with a plaster like substance was found near Mr. Tyree's body. That material was found to be consistent with the plaster material Petitioner used in his work at the apartment unit Mr. Tyree was building. (Tr. 3068).

At trial, both Petitioner and his wife testified that he had thrown his new revolver into the Kanawha River three days after the victim was murdered. Petitioner testified that he also threw a box of .38 caliber bullets into the River. He further testified that he threw the gun away because he thought the police would find him with it and charge him with Mr. Tyree's murder. (Tr. 4215-4220).

In addition to the conflicting statements Petitioner gave regarding the handgun, he also gave the police a series of evolving statements regarding the stolen checks and the victim's murder. In fact, Petitioner testified at trial that none of the five statements he gave police were true but that some were partially true. (Tr. 4212-4213). The changing stories given by Petitioner are summarized as follows:

a. Petitioner initially denied any involvement except to state that he signed Mr. Tyree's name to the checks. However, after Petitioner had given handwriting exemplars to

the State Police, he acknowledged that he had actually filled out the checks as well. He then stated that the checks were actually stolen by Kenneth "Butch" Mitchell, with whom he had split the proceeds (Tr. 3384-86, 3405-3407);

b. Petitioner next claimed that Mitchell had killed the victim to cover up the crimes relating to the checks. Petitioner maintained that he know nothing about the killing until Mitchell took him to see Mr. Tyree's body (Tr. 3416, 3435);

c. Petitioner then asserted that his partner in crime was actually named Billy Eads. Petitioner then changed the name to Billy Edens and then to Billy Helmick (Tr. 3461, 3465, 3474-87, 3492-93); and

d. In each of the scenarios, Petitioner claimed that his partner in crime (whose identity continued to change as well) had been caught by Mr. Tyree in the school parking lot attempting to steal additional checks from the glove compartment of Mr. Tyree's vehicle. Petitioner's story was that the mysterious partner then pulled a gun and made the victim drive the three of them to the remote location at Second Creek where Mr. Tyree was shot and killed.

e. Interestingly, Petitioner acknowledged in his statements that Mr. Tyree's shoes did not have any fingerprints on them because they had been held by a coat. He further stated in one of the statements that he had wiped Mr. Tyree's vehicle of any fingerprints. Petitioner also stated in one of his statements that he had blood on his hands. These statements were made before any of the forensics had been performed on the items in question or before the information became public knowledge. (Tr. 3442, 3444).

(*See also,* Tr. 4233-4237).

Although Petitioner claimed that he lied throughout his various statements, he acknowledged on cross examination that the details he gave during those times matched what happened to Mr. Tyree and the evidence that was adduced in the case. The pertinent section of his cross-examination follows:

Q. Who said there was a blood spot up there on the ridge?

A. I did.

Q. Who said that the body was on its face?

A. I did.

Q. Who said it had been shot twice?

A. I did.

Q. Who said that he was shot once while walking up the hill?

A. I did.

Q. And who said that that shot was to the back of the head?

A. I did.

Q. Who said that he was shot once while he was facedown on the ground?

A. I did.

Q. Who said the body was turned over?

A. I did.

Q. Who said he was dragged over the hill?

A. I did.

Q. Who said the Jeep [Mr. Tyree's vehicle] was parked up close to where Mr. Tyree was shot?

A. I did.

Q. Who said he was pulled by his feet?

A. I did.

Q. Who said his shoes were jerked off?

A. I did.

Q. Who said you drove back down off the hill?

A. I did.

Q. Who said the wallet was taken?

A. I did.

Q. Who said the keys were taken?

A. I did.

Q. Who said a card was taken from Mr. Tyree's wallet?

A. I did.

Q. Who said that there was a checkbook handled on the scene?

A. I did.

Q. Who said that there was—had blood on their finger?

A. I did.

Q. Who said that the shoes were thrown out in the hollow?

A. I did.

Q. Who said that the shoes were thrown to the left?

A. I did.

Q. Who said that the Jeep was parked at the church?

A. I did.

Q. Who said it's their handwriting on their checks?

A. I did.

Q. Who said there was a gas line on the hill?

A. I guess I did. I don't remember.

Q. I will show you in a minute. Who said he was pulled over the hill?

A. I did.

Q. Who said they'd bite their cigarettes?

A. I did.

Q. Who said there was a logging road up there?

A. I did.

(Tr. at 4303-4305).

Likewise, the Petitioner acknowledged at trial that the description he gave of the killer to the police closely resembled him:

Q. Who described in these statements, who said that the killer, Mr. X, parted his hair in the middle?

A. In the statements?

Q. Uh-huh.

A. I did.

Q. Who said he had shoulder length hair.

A. I did.

Q. Who said he had thick eyebrows?

A. I did.

Q. Who said he had a mustache?

A. I did.

Q. Who said he had a small beard?

A. I did.

Q. Who said he wore blue jeans?

A. I did.

Q. Who said he had a blue jean jacket?

A. I did.

Q. Who said he wore tennis shoes?

A. I did.

Q. Who said he had a flannel shirt?

A. I did.

Q. Who said he had a scar over his right eye?

A. I did.

Q. Who said he had gaps in his teeth?

A. I did.

Q. Who said he drove a green car?

A. I did.

Q. Who said he was the same age as you?

A. I did.

Q. Who wore their hair parted in the middle?

A. A lot of people does.

Q. Did you?

A. Yes.

Q. Who had shoulder length hair?

A. I did.

Q. Who had thick eyebrows?

A. I guess I do.

Q. Who had a mustache back then?

A. I did.

Q. Who had a small beard?

A. My beard wasn't that small.

Q. Was it a thick beard?

A. It was thick towards the bottom.

Q. Well, the jury has seen the photographs. Who had blue jeans?

A. I did.

Q. Who had a blue jean jacket?

A. I did.

Q. Who had tennis shoes?

A. I did.

Q. Who had a flannel shirt on?

A. I did.

Q. Who had a scar over their right eye?

A. Got one on my right and left.

Q. Who had a scar on their right eye?

A. I did.

Q. Who had a green car?

A. I did.

Q. Who was the same age at the killer, twenty-three at that time, right?

A. In the statement, I did.

(Tr. at 4396-4308).

At one point, Billy Edens—who was named by Petitioner as one of the many shooters—was arrested and lodged in the Kanawha County Jail. Greg Elswick was an inmate there at the same time. Elswick was still in jail when Petitioner was arrested. At trial, Elswick testified that Petitioner wanted him to tell Petitioner's lawyers that while they were incarcerated together, Edens admitted to killing Mr. Tyree. One of the things Elswick was to say was that Edens told

him it was "easy" to kill someone and that it "only took a second." (Tr. 3133-36). These same remarks recur throughout the various statements Petitioner gave police.

At trial, a recurring theme throughout the State's case was the similarity between Petitioner's own appearance and the physical description he gave of the killer in each of the various statements he gave police. The alleged accomplice and Petitioner both had long hair, facial hair, gaps between the teeth, and a scar over one eyebrow. The theory was that Petitioner changed details to deflect blame from himself but otherwise stuck to a story that fairly accurately described the events leading to Mr. Tyree's death, including the description of himself as the murderer.

At trial, Petitioner relied on an alibi defense. Three friends testified that they recalled seeing Petitioner at the Go-Mart in Spring Hill on November 17, 1983 at various times around 3:40 p.m. This was significant to the defense because a custodian was able to say that she saw the victim leave the school just before she clocked out at 3:07 p.m. on that day. Importantly, none of the witnesses was asked about providing an alibi until two and a half years after the crime.

There were several discrepancies with the alibi witnesses' testimony. One alibi witness testified that he was sure that he saw Petitioner at the 7-Eleven but later asked if he could take the stand again to correct his testimony to make it the Go-Mart. Another alibi witness was unable to correctly describe Petitioner's appearance at the time. That witness testified that Petitioner had short hair and no facial hair on November 17, 1983. However, a photograph taken on November 18, 1983, showed that Petitioner had long hair, a mustache and beard.

On April 11, 1986, a Kanawha County petit jury found Petitioner guilty of six counts of forgery, six counts of uttering, one count of kidnapping and one count of first-degree murder

based upon the felony murder with the underlying felony being robbery. The jury recommended mercy on the first-degree murder but recommended no mercy on the kidnapping count. On June 2, 1986, the Petitioner was sentenced to concurrent sentences—effectively a life sentence with no possibility of parole.

On August 3, 1989, Petitioner filed a Petition for Appeal with this Court but such petition was refused by Order entered November 7, 1989. In 1993, Petitioner filed a Petition for Writ of Habeas Corpus in the Circuit Court of Kanawha County alleging the following relief: (a) denial of due process and fair trial as a result of the introduction tainted serological evidence [*Zain* issue]; (b) denial of due process because the first-degree murder conviction was based upon insufficient evidence to support underlying felony of robbery as the predicate for the felony-murder conviction; (c) denial of due process due to an improper kidnapping instruction; (d) denial of due process based on an improper aggravated robbery instruction; (e) prosecutorial misconduct pertaining to comments about Petitioner's failure to call a specific alibi witness; (f) prosecutorial misconduct for commenting on the pre-trial silence of alibi witnesses; (g) prosecutorial misconduct for attempting to improperly influence the jury; and (h) prosecutorial misconduct for appealing to the passion or prejudice of the jury.

An evidentiary hearing was held on July 25, 2003. On January 26, 2004, the circuit court denied the habeas petition in a detailed sixteen-page opinion that addressed each of the claims on the merits. Petitioner then filed a Petition for Appeal with this Court. On January 19, 2005, the Court refused the Petitioner for Appeal. On March 27, 2007, Petitioner filed the instant habeas petition. On July 10, 2008, Petitioner filed a Post-Conviction DNA Testing Pursuant to West Virginia Code Section 15-2B-14 seeking re-testing of the cigarette butts only. The Motion was filed as part of the habeas petition.

ARGUMENT

1. Petitioner is not entitled to habeas corpus relief because the evidence sought to be tested would not likely produce an opposite result.

West Virginia's post-conviction habeas corpus proceedings afford a petitioner with an opportunity to "raise any collateral issues which have not previously been fully and fairly litigated." *State ex rel. Markley v. Coleman*, 215 W.Va. 729, 732 (2004); *Losh, supra.* At the omnibus habeas corpus hearing, a petitioner is required to raise all grounds known or that reasonably could have been known by him. *Markley*, 215 W.Va. at 733. This Court has stated that the "post-conviction habeas corpus statute . . . clearly contemplates that a person who has been convicted of a crime is ordinarily entitled, as a matter of right, to only one post-conviction habeas corpus proceeding." Syl. Pt. 1, *Gibson v. Dale*, 173 W.Va. 681 (1984). Furthermore, the initial habeas corpus hearing is *res judicata* as to all matters raised and to all matters known or which with reasonable diligence could have been known. *Losh*, 166 W.Va. at Syl. Pt. 4. Therefore, only ineffective assistance of habeas counsel, newly discovered evidence, or a change in law favorable to the applicant and which may be applied retroactively can be considered in any subsequent habeas petition. *Id.*

To be sure, a petitioner is entitled to careful consideration of his claims. *Markley*, 215 W.Va. at 734 (citation omitted). Such consideration is mandated to assure that no violation of a petitioner's due process rights could have escaped the attention of either the trial court or the State Supreme Court. *Id.* Circuit courts denying or granting relief in a habeas corpus case are statutorily required to make specific findings of fact and conclusions of law relating to each contention advanced by a petitioner and to state the grounds upon which the matter was determined. *Id.* This Court has held that where a petitioner fails to provide adequate factual

support for his allegations and makes nothing more than mere blanket assertions without the appropriate factual basis, the claims must be denied. *Id.*

Petitioner claims that pursuant to *In the Matter of Renewed Investigation of the State Police Crime Laboratory, Serology Division*, 219 W.Va. 408 (2006) (hereinafter "*Zain III*" he has a right to a full habeas review of the serology evidence presented against him by the West Virginia State Laboratory. In *Zain III*, this Court stated that a conviction based on false evidence will not be set aside "unless it is shown that the false evidence had a material effect on the jury verdict." *See* also, Syl. Pt. 2, *In the Matter of an Investigation of the West Virginia State Police Laboratory*, 190 W.Va. 321 (1993) (hereinafter "*Zain I*").

In *Zain III*, this Court found that "[s]erology reports by employees of the Serology Division of the West Virginia State Police Laboratory, other than Trooper Fred S. Zain, are not subject to invalidation and other strictures contained in [*Zain I*]." Syl. Pt. 2, *Zain III*; Syl. Pt. 3, *Matter of W.Va. State Police Crime Lab*, 191 W.Va. 224 (1994) (hereinafter "*Zain III*").

In *Zain III*, this Court promulgated the requirements that must be met when a prisoner is challenging a conviction based upon the serology evidence. The first hurdle that a prisoner faces in challenging a conviction is proving that the serologist offered false evidence in the prosecution. *Id.* at 415. Furthermore, *Zain III* laid out additional requirements that the prisoner must satisfy the following standards to establish that a new trial is warranted:

> A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that [defendant] was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the

> same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.

Id. (citing Syl. Pt. 1, *Halstead v. Horton*, 38 W.Va. 727 (1894); Syllabus, *State v. Frazier*, 162 W.Va. 935 (1979).

Furthermore, in order to "ensure that prisoners against whom serologists offered evidence receive a thorough, timely and full review of their challenges to the serology evidence" this Court enacted the following safeguards:

> First, a prisoner against whom a West Virginia State Police Laboratory serologist, other than Fred Zain, offered evidence and who challenges his or her conviction based on the serology evidence is to be granted a full habeas corpus hearing on the issue of the serology evidence. The prisoner is to be represented by counsel unless he or she knowingly and intelligently waives that right. The circuit court is to review the serology evidence presented by the prisoner with searching and painstaking scrutiny. At the close of the evidence, the circuit court is to draft a comprehensive order which includes detailed findings as to the truth or falsity of the serology evidence and if the evidence is found to be false, whether the prisoner has shown the necessity of a new trial based on the five factors set forth in the syllabus of *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979).

Zain III 219 W.Va. at 415. Additional safeguards include a requirement that the circuit court hear the prisoner's challenge in a reasonably timely manner and the Court "suspends to a limited degree the rules of *res judicata* that generally apply to a petitioner for a writ of habeas corpus subjiciendum." *Id.*

The clear import of *Zain III* is that the evidence to be tested must likely produce an opposite result if a new trial were to occur. The evidence cannot be such that it is merely to impeach or discredit a State's witness. The cigarette butt that Petitioner seeks to have tested was merely one piece of the puzzle. Moreover, this evidence was subjected to effective cross-examination. Trial counsel effectively cross-examined Serologist Inman regarding her results.

She acknowledged on cross-examination that thirty-four percent of the population has ABO Type O. The jury heard that evidence and still proceeded to convict the Petitioner.

Even taking the serology evidence out of the picture, the State still had overwhelming evidence to convict the Petitioner. It had the bloody fingerprint that matched the Petitioner's that was found on Mr. Tyree's checkbook. It had the Petitioner's admissions that he forged Mr. Tyree's name on several checks and cashed those checks. It had Petitioner's ever-changing and inconsistent statements regarding his elusive partner in crime who Petitioner claimed actually murdered Mr. Tyree. However, these statements made it clear that Petitioner had intimate knowledge of what occurred on that hillside in Second Creek. Finally, the State also had evidence that the Petitioner used one of Mr. Tyree's checks to purchase a handgun and ammunition just one week before the murder. The handgun and ammunition were the same caliber as used in Mr. Tyree's murder.

To be sure, the cigarette butt was a piece of the puzzle in the evidence that the jury used to convict Petitioner. However, it was a small piece among many larger pieces. Based upon the forgoing arguments, Petitioner is not entitled to the relief requested and his Motion should be denied.

2. Petitioner is not entitled to relief under West Virginia Code section 15-2B-14 because he has failed to meet the necessary requirements of the statute.

Petitioner's reliance on West Virginia Code section 15-2B-14 is also misplaced. This provision also does not mandate testing in every case. West Virginia Code section 15-2B-14(a) states that "[a] person convicted of a felony currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction for performance [DNA] testing." Furthermore, West Virginia Code section 15-2B-14(m) reinforces the notion that testing is not absolute. This provision states that "the right to *file a motion* for post-

conviction DNA testing . . . is absolute and may not be waived. W.VA. CODE § 15-2B-14(m)(emphasis added). If the Legislature had intended that the right to DNA testing be absolute, it would have specifically provided so in the statute.

The Motion for Post-Conviction DNA Testing must be verified by the convicted person under penalty of perjury. *Id.* at § 15-2B-14(c)(1). The Motion must also: (a) explain why the identity of the perpetrator was, or should have been a significant issue in the case; (b) explain in light of all the evidence, how the requested DNA testing would raise a reasonable probability the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction; (c) make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought; (d) reveal the results of any DNA or other biological testing previously conducted by either the prosecution or defense, if known; and (e) state whether any motion for testing under this section has been filed previously and the results of that motion, if known. *See* W.VA. CODE § 15-2B-14(c)(1).

In his Motion for Post-Conviction DNA Testing, Petitioner fails to fulfill the requirements listed in subsection 14(c)(1). He merely makes blanket assertions. DNA testing would not raise a reasonable probability that the Petitioner's verdict would be more favorable if the results of the testing had been available at the time. Again, this is evidence by the overwhelming evidence proffered by the State at trial. It is also evidenced by the fact that during cross-examination of Serologist Inman, she acknowledged that thirty-four percent of the population had ABO Type O and anyone with that blood type could have left the cigarette butt there. The jury heard this evidence at trial and chose to convict anyway based upon *all* of the evidence adduced at trial.

Moreover, West Virginia Code section 15-2B-14(f) provides that a court shall grant a motion for DNA testing if *all* of the following requirements are established: (1) the evidence tested is available and in a condition that would permit the DNA testing requested; (2) the evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect; (3) the identity of the perpetrator of the crime was, or should have been, a significant issue in the case; (4) the convicted person has made a prima facie showing that the evidence sought for testing is material to the issue of the convicted person's identity as the perpetrator of or accomplice to, the crime, special circumstance, or enhancement allegation resulting in the conviction or sentence; (5) the requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more if DNA testing results had been available at the time of the conviction; (6) the evidence was either not previously tested or the evidence was tested previously but the requested DNA test would provide results that are reasonable more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results; (7) the testing requested employs a method generally accepted within the relevant scientific community; (8) the evidence or the presently desired method of testing DNA was not available to the defendant at the time of trial or a court has found ineffective assistance of counsel at the trial court level; and (9) the motion is not made solely for the purpose of delay. With respect to number (5), the court may consider any evidence regardless of whether it was introduced at trial.

Petitioner fails to address all tenets of West Virginia Code section 15-2B-14(f) because he cannot meet all of the necessary requirements. Importantly, he cannot show that the evidence sought to be tested is material to the issue of identity. Considered the overwhelming evidence

introduced at trial against Petitioner and the effective cross-examination evidence elicited from Serologist Inman, it is clear that the cigarette butt was not a material piece of evidence. In addition to this cross-examination, there was also evidence that the butt was found in an open wooded area that was frequented by other people. To be sure, a hunter found Mr. Tyree's body the day after the shooting. Even after hearing this evidence, the jury convicted Petitioner on all counts. Therefore, Petitioner fails to demonstrate that the outcome of his trial would have been different had the cigarette butt belonged to someone other than himself. Because he cannot meet all of the requirements of West Virginia Code section 15-2B-14(f), Petitioner's request for relief should be denied.

CONCLUSION

This Court should refuse to issue a Rule to Show Cause as Petitioner has failed to demonstrate that they are entitled to the issuance of a Writ of Mandamus. Considering the briefs submitted by the parties and the argument heard by counsel, the lower court properly exercised its authority in denying the Motion for Post-Conviction DNA Testing. Accordingly, this Court should refuse to issue a Rule to Show Cause and deny the Petition for a Writ of Mandamus.

Respectfully submitted,

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NO. 090405

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Action No: 07-MISC-139 (Circuit Court of Kanawha County, West Virginia)

STATE OF WEST VIRGINIA

ex rel. GREGORY BURDETTE,

Petitioner,

v.

THE HONORABLE PAUL ZAKAIB, JR.
Kanawha County Circuit Court Judge,

Respondent.

CERTIFICATE OF SERVICE

I, Jennifer D. Meadows, do hereby certify a true copy of the **Response to Petition for Writ of Mandamus and in Opposition to the Issuance of a Rule to Show Cause**, was served upon Petitioner via regular United States Mail, postage pr-paid, addressed as follows:

Barron M. Helgoe, Esq.
Victor Victor & Helgoe, LLP
Post Office Box 5160
Charleston, West Virginia 25361

on the 15th day of April, 2009.

Jennifer D. Meadows

Jennifer D. Meadows (*WVSB #9619*)